IN THE SUPREME COURT OF MISSOURI
EN BANC

Case Number SC86363

UTILITY SERVICE AND MAINTENANCE, INC.
and
TIG INSURANCE COMPANY

Plaintiffs/Respondents

vs.

NORANDA ALUMINUM, INC. and
ZURICH INSURANCE COMPANY

Defendants/Appellants

Appeal from the Circuit Court of St. Louis County, Missouri
Division 26
Honorable Carolyn C. Whittington, Judge
Cause No. 98CC-004068

Transferred from Missouri Court of Appeals, Eastern District (No. ED82504)
Pursuant to Mo. R. Civ. P. 83.04

SUBSTITUTE BRIEF OF APPELLANT ZURICH INSURANCE COMPANY

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JURISDICTIONAL STATEMENT

Jurisdiction of this appeal is based upon MO. CONST. art. V, § 10 and Mo. R. Civ. P. 83.04. The instant action was a suit for declaratory judgment and indemnification brought by Plaintiffs/Respondents TIG Insurance Co. ("TIG") and Utility Service & Maintenance, Inc. ("USM"). TIG had unconditionally accepted Defendant/Appellant Noranda Aluminum, Inc.'s ("Noranda") tender of defense and indemnification in an underlying personal injury suit. TIG thereafter controlled Noranda's defense in the underlying suit, and ultimately settled the case for $4.3 million. After settlement, TIG decided that it had no duty to defend and indemnify Noranda in the underlying suit, and filed the instant action, seeking from Noranda and its insurer, Zurich Insurance Company, restitution/reimbursement of monies it had paid to defend and settle the personal injury suit. In a bench trial, the trial court entered judgment in favor of TIG and USM for $5,848,465.46, including the underlying suit settlement payment, attorneys' fees, costs, and interest thereon.

Defendants/Appellants appealed the judgment to the Missouri Court of Appeals-Eastern District. After the court of appeals issued its opinion in the appeal, this Court sustained Noranda's Application for Transfer, and now reviews the case as an original appeal. *Buchweiser v. Estate of Laberer*, 695 S.W.2d 125, 127 (Mo. banc 1985).

STATEMENT OF FACTS

1. Defendant Noranda Aluminum, Inc. ("Noranda") is a large aluminum manufacturer with a plant and office in New Madrid, Missouri. (LF 63-64)

2. Plaintiff Utility Service and Maintenance, Inc. ("Utility") is an industrial painting company that specializes in painting high voltage electrical equipment, apparatus, and structures for large industrial customers and utilities. (T., 9:21 – 10:1) In 1991, 1992, and 1993, Utility's gross sales were approximately $2.5 million, and its total assets were valued at $850,000. (LF 63-64; T., 3:23-25, 4:1-3)

3. Plaintiff TIG Insurance Company ("TIG"), successor in interest to Transamerica Insurance Company, insured Utility under (a) Commercial General Liability Insurance Policy No. 3018 22 74 for the policy period November 30, 1991 to November 30, 1992 and containing liability limits of $1 million per occurrence (P. Ex. 36; T., 140:24-25) (the "TIG/Utility Primary Policy); and (b) Coverage Plus Excess Liability Insurance Policy No. XLB 2785907 for the same policy period and containing liability limits of $4 million in excess of the limit under the TIG Utility Primary Policy (P. Ex. 37; T., 140:24-25) (the "TIG/Utility Excess Policy") (collectively, the "TIG/Utility Policies").

4. Among other liability coverages, the TIG/Utility Policies provided Utility coverage for any liability arising from any contract or agreement Utility entered into pertaining to its business under which Utility assumed the tort liability of another party for bodily injury to a third person or organization ("Insured Contract Liability Coverage"). (T., 190:2-192:2; P. Ex. 36; Policy pp. 1, 4)

5. Defendant Zurich Insurance Company ("Zurich") insured Noranda under (a) Commercial General Liability Insurance Policy No. 8905624 for the policy period February 28, 1989 to May 1, 1994 and containing liability limits of $2 million per occurrence (P. Ex. 38; T., 140:24-25); and (b) Umbrella and Follow Form Excess Liability Insurance Policy No. 8815231 for the policy period May 1, 1992 to May 1, 1994 and containing liability limits of $5 million per occurrence (P. Ex. 39; T., 140:24-25) (collectively, the "Zurich/Noranda Policies")

6. On or about July 30, 1992, Noranda issued bid packages to prospective contractors in order to obtain their bids for the painting of Noranda's electrical power structures located at its New Madrid aluminum factory. (P. Ex. 45; T., 136:16-17) In due course, Utility submitted to Noranda on the bid package forms previously provided by Noranda Utility's proposal to complete the painting for $55,240.00. (P. Ex. 44; T., 22:9-15, 136:16-17)

7. On August 31, 1992, Noranda transmitted by facsimile to Utility Noranda's Purchase Order No. 229074 requesting Utility to supply all "labor, supervision, materials, tools, equipment and tax[es] as necessary to prepare and paint the Phase I and Phase II Rectifier Yard Substation structures in accordance with Noranda's Engineering Specification No 50140" (the "Project") for a total price of $55,240.00. (P. Ex. 46; T., 25:3-10, 136:16-17) The Purchase Order additionally stated: "Acceptance of this Purchase Order confirms your acknowledgement of our standard terms and conditions." The "standard terms and conditions" were not attached to the faxed Purchase Order (T., 25:18-25).

8. On September 10, 1992, Utility received by certified mail from Noranda a September 3, 1992 letter enclosing the Terms and Conditions of Purchase by Noranda of Utility's painting services (the "Terms and Conditions"). (P. Ex. 47; T., 26:11 - 27:25; A. 1-2) Paragraph 19 of the Terms and Conditions provided:

> Seller [Utility] shall indemnify and save Purchaser [Noranda] free and harmless from and against any and all claims, damages, liabilities or obligations of whatsoever kind, including, but not limited to, damage or destruction of property and injury or death of persons resulting from or connected with Seller's performance hereunder or any default by Seller or breach of its obligations hereunder.

(P. Ex. 47, p.2; A. 2) (hereinafter, "Terms and Conditions ¶ 19" or "Paragraph 19"). After receiving the Terms and Conditions, Utility commenced work on the Project. (T., 28:9-11) (the Purchase Order and the Terms and Conditions of Purchase, collectively, the Utility/Noranda "Contract")

9. On October 6, 1992, Gary Murphy ("Murphy"), at all times material an employee of Utility, was seriously injured and disfigured during the course and scope of his employment with Utility while performing work on the Project when an explosion occurred at certain electrical transformers in the area of Noranda's New Madrid, MO facility where he was working (the "Injuries"). (T., 29:7-9, 79:5-80:5; LF 13, ¶ 19; LF 42, ¶ 1; LF 49, ¶ 1)

10. On or about June 15, 1995, Murphy filed a Petition (the "Petition") in Case No. 952-1986 in the Circuit Court of the City of St. Louis, Missouri styled "Gary Murphy, Plaintiff v. Noranda Aluminum, Inc. and Troy L. Long, Defendants" (the "Underlying

Action"), a personal injury/premises liability action wherein Murphy sought damages for his Injuries arising from the alleged negligence of defendants Noranda and Long. The Petition alleged that Long, at all times material, was Safety Manager for Noranda's New Madrid, MO facility acting in the course and scope of his employment with Noranda. (A. 3-11)

11. By letter of June 30, 1995, Noranda forwarded to Utility a copy of the Petition served upon Noranda in the Underlying Action and, pursuant to the Contract, demanded that Utility defend and indemnify Noranda for the claims of Murphy against Noranda in the Underlying Action. (P. Ex. 50; D. Ex. E; T., 379:22; A. 12) ("Noranda's Initial Demand Letter") In the letter, Noranda based its claim for defense and indemnification upon an Exhibit C General Conditions for Contracts ("Contract Exhibit C"), to which it thought Utility had assented as part of the Contract, and which it thought was part of the Contract documents and papers. (T., 260:3 - 261:6; A. 12)

12. On July 6, 1995, Utility's insurance broker/agent transmitted by facsimile to TIG a letter enclosing a copy of the Petition served by Murphy upon Noranda in the Underlying Action. The letter stated to TIG: "There was a hold harmless agreement between Utility Service & Maintenance and Noranda Aluminum. The defense of this suit is now the responsibility of the TIG Insurance Company under the contractual liability portion of the policy." (P. Ex. 62; T., 146:1-9; A. 13)

13. By letter of July 12, 1995, counsel retained by TIG under the TIG/Utility Policies to represent Noranda in the Underlying Action ("TIG's Retained Noranda Counsel") informed Noranda that they would be entering their appearance for Noranda "to protect the

answer date and [obtain] an extension of time in which to answer through August 25, 1995." TIG's Retained Noranda Counsel further stated in the letter.

> [Such additional] time will provide TIG an opportunity to review and obtain its investigation file and make a determination as to whether TIG or [Utility] does, in fact, owe a defense to [Noranda] as a result of the contract which you cite in your June 30, 1995 correspondence.
>
> If it is the determination of [TIG] that no defense is owing to [Noranda], then we will notify you immediately upon that determination. At that point, we will then withdraw our appearance on behalf of [Noranda] and either you, or someone else who is selected by [Noranda] will enter their appearance to further defend it in the pending action. "

(P. Ex. 65; T., 224:6-7; A. 14)

14. By letter of July 12, 1995, TIG's Retained Noranda Counsel also informed Murphy's counsel in the Underlying Action:

> [T]here is a discussion going on now between your client's employer [i.e. Utility] and [Noranda] as to whether or not a hold harmless agreement requires [Utility] to provide a defense to [Noranda and Long] in this matter. We should have that resolved in the next few weeks, which will then allow us to file whatever responsive pleadings are necessary. If it is determined that there is no hold harmless agreement, then I would suspect that some other firm will be entering on behalf of the Defendants.

(P. Ex. 64; T., 224:6-7; A. 15-16)

15. By letter of September 6, 1995, TIG's Retained Noranda Counsel informed TIG: "[I]t appears that [P]aragraph 19 may require Utility to honor the tender of defense and indemnity made by Noranda." In the letter, the TIG's Retained Noranda Counsel also informed TIG: "[T]his appears to be a case where there is no liability for Noranda [based upon the lack of direction and control exercised by Noranda over Utility and its employees, including Murphy, in their work on the Project, and based upon Murphy's significant fault for his own injuries]." (P. Ex. 53; T., 224:6-7; A. 17-19)

16. By letter of December 29, 1995, TIG authorized its Retained Noranda Counsel in the Underlying Action to "accept the tender of defense and indemnification by Noranda Aluminum, Inc., enter an ***unconditional*** appearance and answer and proceed with the defense of the case." ("Unconditional Acceptance of Tender Authorization") (D. Ex. G; T., 380:12; A. 20) (emphasis added) TIG's Retained Noranda Counsel, in turn, by letter dated January 3, 1996, informed Noranda that Retained Noranda Counsel had "received an oral and a handwritten commitment on behalf of TIG Insurance Group to accept, ***unconditionally***, Noranda Aluminum's tender of defense and indemnification." (D. Ex. F; T., 380:7; A. 21) (emphasis added) TIG did not disclose to Noranda at this time any kind of caveat or exception to the unconditional nature of its acceptance of Noranda's defense and indemnification in the Underlying Action. (T., 199:20-25)

17. TIG authorized its Retained Counsel to unconditionally accept the tender of defense and indemnification by Noranda in regard to Murphy's claims in the Underlying Action, and to enter unconditionally their appearance as defense counsel for Noranda therein. TIG based its authorization upon (a) the allegations set forth in the Petition, (b) the language

of the indemnity provision set forth in Paragraph 19 of the Utility/Noranda Contract Terms and Conditions, (c) the nature of the broad form indemnity provision contained in the TIG/Utility Policies, which provided Insured Contract Liability Coverage to Utility, (d) TIG's Retained Noranda Counsel's legal advice in their September 6, 1995 letter to TIG that TIG and Utility owed Noranda defense and indemnification in the Underlying Action, and (e) TIG's desire to eliminate the possibility of a court determination of its bad faith in denying coverage, which determination might have exposed Utility to liability to Noranda in excess of the TIG/Utility Policy limits. (T., 160:14-22, 161:1-6, 176:7-14, 186:8 - 187:13, 206:16 - 208:5, 221:5-12, 222:8-19)

18. Charles Bittner, the TIG senior claims analyst issuing the December 29, 1995 Unconditional Acceptance of Tender Authorization to TIG's Retained Noranda Counsel testified in regard to the Authorization:

> You have to understand that this was my last day there [at TIG]. It was early in the afternoon. This thing was hang fire. I knew that TIG had an obligation to do something. TIG at that point had eliminated their claim staff around the country, everybody but about three of us. . . And when I [said] unconditional, I didn't want to go back and forth with defense counsel [i.e. TIG's Retained Counsel] and with Mr. Rost [Noranda's outside counsel] anymore, ***I wanted to get out of there***.

(T., 198:14-23) (emphasis added).

19. When TIG unconditionally accepted Noranda's tender of defense and indemnification and notified Noranda of same, Noranda stopped searching for counsel to

represent it in the Underlying Action, and gave total control of its defense to TIG's Retained Noranda Counsel. (T., 303:23-304:3)

20. TIG never issued its insured, Utility, any reservation of rights letter in relation to Murphy's claims against Noranda in the Underlying Action that informed Utility of TIG's reservation of the right to withdraw from Noranda's defense and indemnification if TIG determined that either (a) the TIG/Utility Policies provided Utility no coverage for Noranda's demand against Utility for defense and indemnification in the Underlying Action, or (b) the Utility/Noranda Contract, pursuant to which TIG undertook Noranda's defense, actually imposed no obligation on Utility and TIG to assume Noranda's defense and indemnification. (T., 75:2-4; 116:2-8, 118:7-8, 204:2-7)

21. On or about March 4, 1997, almost 1 ¼ years ***after*** TIG had authorized its Retained Counsel to unconditionally accept the tender of defense and indemnification by Noranda and unconditionally enter their appearance as defense counsel for Noranda in the Underlying Action, TIG hired separate outside counsel to determine whether the TIG/Utility Policies and Utility/Noranda Contract required TIG to provide coverage to Utility for the Contract-based claim of Noranda for defense and indemnification in the Underlying Action ("TIG's Coverage Counsel"). (P. Ex. 6; D. Ex. I; T., 382:6; A. 22-23). By letter of the same date, TIG's Coverage Counsel requested from Noranda copies of the Zurich/Noranda Policies and Contract Exhibit C, upon which Contract exhibit Noranda's Initial Demand Letter had initially predicated its demand for defense and indemnification in relation to the Underlying Action. (P. Ex. 6; D. Ex. I; T., 382:6; A. 22-23)

22. By letter dated May 14, 1997, TIG's Coverage Counsel again requested that Noranda provide a copy of Contract Exhibit C. In the letter, TIG's Coverage Counsel stated:

> D.C. Dunaway, the President of Utility Services, has indicated to us that he has no recollection of ever receiving Exhibit C (General Conditions for Contract) of the substation Painting Proposal for Noranda Aluminum, Inc., dated August 10, 1992. We have been providing a defense based upon Noranda's representation in your letter, dated June 30, 1995, that paragraph 13 of Exhibit C contained an enforceable indemnity agreement between Noranda Aluminum and Utility Services.
>
> We understand that on or about September 6, 1995 Joe Swift [TIG's Retained Noranda Counsel] requested that you supply Exhibit C. Because of your long delay and refusal to supply Exhibit C . . . , we have reason to believe that such a document is not a part of the contract between Utility Services and Noranda Aluminum under the Substation Painting Proposal. If in fact there is no provision which contains an enforceable indemnity agreement, we believe that Noranda should take over defense of the Gary Murphy lawsuit, and that TIG should be reimbursed for the defense costs it has incurred because of Noranda's representations.

(P. Ex. 8; D. Ex. K; T., 382:18; A. 25)

23. As an enclosure to its May 16, 1997 letter to TIG's Coverage Counsel, Noranda provided TIG a copy of Contract Exhibit C. (T., 317:17-19) Noranda also informed TIG's Coverage Counsel in the letter: "Without disparaging Mr. D.C. Dunaway's

recollection of what he received, it is noteworthy that he signed the proposal which specified Exhibits A, B, C, and D as part of the contract documents." (P. Ex. 9; D. Ex. L; T., 382:24; A. 26-27) Contract Exhibit C, ¶ 13 provided:

> Without limiting the foregoing, Contractor [Utility] shall indemnify, save harmless, release, and at Owner's request, defend Owner [Noranda] and Engineer and their subsidiaries, affiliated companies, and the agents and employees of any of the foregoing, from and against any and all suits, actions, legal or administrative proceedings, claims, demands, damages, penalties, fines, costs and expenses of whatsoever kind or character, including but not limited to attorneys' fees and expenses, arising out of or by reason of any injuries (including death) or damage to any person or entity employed by or acting on Contractor's behalf under this Contract, except where caused by the sole negligence of the Owner.

(D. Ex. B; T., 380:2)

24. On October 6, 1997, Murphy filed his First Amended Petition in the Underlying Action. In addition to the claims made against Noranda and Long in the original Petition, Murphy now asserted negligence claims against new defendants New Madrid Municipal Light and Power Company and a "John Doe" electrical generating and/or transmission company, which companies Murphy asserted were jointly and severally liable with Noranda to him for his Injuries. (P. Ex. 4; T., 134:6; A. 28-44)

25. By letter of August 24, 1998, Murphy served upon TIG's Retained Noranda Counsel a demand for settlement of Murphy's claims against Noranda in the Underlying

Action in the amount of $30,000,000 under R.S.Mo. § 408.040(2). (P. Ex. 19; T., 135:6; A. 45)

26. By letter of August 31, 1998, Noranda served upon TIG its acknowledgement of Murphy's $30,000,000 demand for settlement, and its demand that TIG settle the Underlying Action within the limits of the TIG/Utility Policies. (P. Ex. 10; T., 132:21; A. 46-47)

27. By letter of September 10, 1998, TIG's Coverage Counsel informed Noranda:

> TIG has been providing a defense to Noranda based upon your representation that paragraph 13, Exhibit C (General Conditions for Contract) was a part of the Substation Painting Contract between Utility Services and Noranda Aluminum. As indicated in my letter to you of May 14, 1997, Mr. Dunaway and Utility Services question that Exhibit C and paragraph 13 were ever supplied to Utility Services and ever became a part of the Substation Painting Contract. Since that issue is in dispute at this time, TIG has continued to defend Noranda pursuant to the terms of the policies issued to Utility Services and Maintenance Co. However, Noranda's rights to defense and indemnity depend upon the validity and presence of an enforceable indemnity agreement between Noranda Aluminum and Utility Services.
>
> TIG will continue to defend and indemnify Noranda based upon your representation that the indemnity agreement is in fact a part of the Substation Painting Contract. TIG will seek reimbursement of the cost of defense and

indemnity from Noranda Aluminum if a determination is made that the indemnity agreement is not a part of said contract.

(P. Ex. 11; T., 132:24-25; A. 48-49)

28. On October 8, 1998, almost 1 ½ years after TIG received a copy of Contract Exhibit C from Noranda and less than 60 days before trial of the Underlying Action, Utility sent a letter to TIG, its insurer, setting forth its demands that TIG settle the claims against Noranda in the Underlying Action within the limits of the TIG/Utility Policies. In the letter, Utility stated to TIG:

> ***USM hereby demands that TIG settle this case within the policy limits of the [TIG/Utility Policies.] . . . [I]t is the position of USM that TIG should resolve Mr. Murphy's claim within the policy limits of the [TIG/Utility Policies] irrespective of the resolution of the issue of the indemnification language with Noranda and/or its insurance carriers***.
>
> I do not need to go into great detail about why this case should be settled within the policy limits so that USM can avoid any excess exposure [i.e. to Noranda]. However, I am advised of the following facts: I understand plaintiff has had significant disfigurement, has incurred medical expenses in excess of $1,000,000, has had over 60 surgeries and has an experienced plaintiff's attorney personally known to me to have had success in this dangerous venue, St. Louis City Circuit Court. USM is at risk and placed in danger, therefore, if full

policy limits – primary and excess – are not tendered by TIG. ***Especially given my information that no settlement offers have been made to plaintiff's counsel to date, it is not surprising that plaintiff has made a $30,000,000 demand and is preparing this case for trial on November 30, 1998. . . .***

Next, partly as a result of the foregoing facts, USM requests that a mediation be scheduled as soon as practicable. Representatives of Liberty Mutual [a workers' compensation lien claimant], Noranda, Noranda's insurance carriers and TIG with authority to settle should be present at this mediation.

Your letter of September 11 suggests that USM may wish to obtain its own attorney to represent USM with respect to the issue of whether TIG is required to defend and indemnify Noranda in this case. USM contends that that is the job of TIG, not USM [and], in fact, we understand from USM's file that Mr. Rynearson [TIG's Coverage Counsel] was retained for that purpose. Frankly, we were somewhat surprised to see that no declaratory judgment action or any other type of litigation has been instituted. This case has been on file since late 1995 and here, in the last quarter of 1998, it appears no steps have been taken to hold Noranda, the named defendant, accountable. . . . [E]ven if the two indemnity clauses [Contract Terms and Conditions ¶ 19 and Contract Exhibit C ¶ 13] are enforceable and

applicable, a legitimate argument can be made that they give rise to no duty on the part of the USM.

. . . .

I understand you have some additional research about why Section 19 and Section 13 may not be applicable or enforceable. I would appreciate receiving copies of those materials. Under the fiduciary obligation you have to the insured, I believe I am entitled to those. ***In light of the foregoing, moreover, I cannot understand why TIG has not pursued more aggressively its reservation of rights against Noranda.*** Mr. Rynearson's [TIG's Coverage Counsel] letter to Mr. Rost [Noranda counsel] of September 10, 1998, for instance, makes no reference to any of these arguments, but instead simply states that TIG will continue to defend and indemnify Noranda 'based upon your representation that the indemnity agreement is in fact a part of the substation painting contract' and further states 'TIG will seek reimbursement of the cost of defense and indemnity from Noranda Aluminum if a determination is made that the indemnity agreement is not part of said contract' [emphasis deleted]. . . .

The only other indication I have of any reservation of rights is Mr. Swift's [TIG's Retained Noranda Counsel] letter dated August 24, 1995 to Mr. Rost [Noranda counsel], stating that although Swift was filing an answer on behalf of Noranda, at TIG's expense presumably,

> 'We are not accepting and assuming the defense of the lawsuit pursuant to the contract executed between Noranda Aluminum and the Utility Service & Maintenance, Inc.' ***That was over three years ago, yet it appears since then Mr. Swift's firm has in fact assumed that defense***. . . . ***Put simply, the file as I see it shows a lack of diligence on the part of TIG to explore this indemnification issue***, ***and therefore it is unreasonable for TIG at this late date to suggest that USM retain an attorney at its expense to do a job TIG should have done.***

(P. Ex. 25; T., 135:24; D. Ex. D; T., 66:14-15; A. 50-52) (boldface and italics emphasis added)

29. Ever since TIG's December 29, 1995 Unconditional Acceptance of Tender, TIG's Retained Noranda Counsel had undertaken complete control of Noranda's Defense in the Underlying Action. They incurred $82,177.16 in attorney's fees and expenses (T., 4:4-11) up to and including the November, 1998 mediation for defense and trial preparation activities. These activities included: drafting and filing an answer to the Petition and First Amended Petition in the Underlying Action, interviewing numerous witnesses, deposing Murphy and numerous other witnesses, analyzing the Utility/Noranda Contract, evaluating psychiatric and psychological reports and analyses, deposing opposition experts and recruiting and preparing their own experts, preparing summary judgment motions and supporting evidence, analyzing Noranda's responsibility as a premises owner for injuries to employees of Utility working on its premises pursuant to independent contract, and

fashioning Noranda's dispositive defenses (Noranda's "Legal Defenses") based upon Murphy's status as either an independent contractor not subject to the direction and control of Noranda, or as a borrowed servant of Noranda who could not sue Noranda because barred by the exclusivity of the workers' compensation remedy. (T., 80:9-84:15) In its case analysis and preparation, TIG's Retained Noranda Counsel also discerned the significant fault that Murphy bore for his own injuries. (T., 78:15-79:4, 92:20-24) (collectively, TIG's Retained Noranda Counsel's "Legal Analysis").

30. Based upon its Legal Analysis, TIG's Retained Noranda Counsel hoped that Noranda could prevail on Noranda's Legal Defenses at trial or on appeal. (T., 99:212, 121:9-15) TIG's Retained Noranda Counsel reported their Legal Analysis and Noranda's Legal Defenses to TIG. (T., 84:18-20). Settlement of the Underlying Action by TIG prevented the assertion of the Legal Defenses on Noranda's behalf at trial. (T., 121:9-18)

31. In November, 1998, just a few weeks before the scheduled November 30, 1998 trial of the Underlying Action (T., 85:24-86:1), the parties to the Underlying Action engaged in a mediation of the dispute. Representatives of Murphy, TIG, Zurich, Noranda, and Utility attended, as did TIG's Retained Noranda Counsel. The TIG representative at the mediation, Ralph Mason, did not want or seek the advice of TIG's Retained Noranda Counsel or Noranda's counsel on any case issues or Noranda defenses before or while attempting to settle the Underlying Action as to defendants Noranda and Long. The TIG representative had sole control of whether or not to settle the Underlying Action, engaged in private, one on one negotiations with counsel for Murphy, and decided on his own to settle the case. (T., 99:17 - 100:20, 118:12 - 119:11).

32. TIG settled the claims against Noranda in the Underlying Action with Murphy by agreeing to pay $4.3 million to Murphy (the "Settlement Payment"). The precise terms of the settlement were manifested in a Settlement Agreement and Release signed by Murphy, Murphy's counsel, and TIG on, respectively, November 25, 1998, November 30, 1998, and December 28, 1998. (P. Ex. 26; T., 135:24; A. 53-58)

33. At no time prior to the November 1998 mediation and settlement of the Underlying Action by TIG did TIG ever advise Noranda that TIG was withdrawing its previous unconditional acceptance of Noranda's defense and indemnification tender in the Underlying Action. (T., 319:20, 328:17-25, 371:1-17) Noranda never again heard from TIG's Coverage Counsel after TIG's Coverage Counsel's letter to Noranda of May 14, 1997. (*See* ¶ 22 *supra*) (T., 327:11)

34. On March 29, 2000, Utility and TIG filed their First Amended Petition for Declaratory Judgment and Indemnity ("First Amended Petition") in Case No. 98CC-004068 in the Circuit Court of the County of St. Louis, Missouri styled "Utility Service and Maintenance, Inc. and TIG Insurance Company, Plaintiffs, vs. Noranda Aluminum, Inc. and Zurich Insurance Company, Defendants." (the "Instant Action"). (LF 10-41)

35. In Count I of the First Amended Petition, Utility and TIG sought a declaration that Utility and TIG had no duty to defend or indemnify Noranda in relation to the Murphy claims in the Underlying Action because (a) Contract Exhibit C was not part of the Utility/Noranda Contract, (b) even if Contract Exhibit C were part of the Contract, Murphy's Injuries arose from the sole negligence of Noranda and Exhibit C expressly excluded any duty of Utility to defend and indemnify Noranda in that circumstance, (c) Terms and

Conditions ¶ 19 was not part of the Utility/Noranda Contract, (d) even if Terms and Conditions ¶ 19 were part of the Contract, Murphy's Injuries arose from the sole negligence of Noranda and Paragraph 19's terms did not include within their ambit any duty of Utility to defend and indemnify Noranda in that circumstance, and (e) even if Terms and Conditions ¶ 19 were part of the Contract, the provision by its terms does not provide Noranda defense and indemnity for Noranda's own negligence. (LF 10-20)

36. Additionally, in Count II of the First Amended Petition, based upon the declaratory relief sought by Utility and TIG in Count I, the plaintiffs asserted an indemnity claim against Noranda and Zurich, in which the plaintiffs sought to recover from the defendants the $4.3 million Settlement Payment paid by TIG to settle the claims against Noranda and Long in the Underlying Action, and all attorney's fees, expenses, and costs incurred by TIG's Retained Noranda Counsel in the Underlying Action. (LF 10-20)

37. On October 8, 2002, the trial court entered judgment in the Instant Action in favor of Utility and TIG and against Noranda and Zurich on the claims of the First Amended Petition. The trial court found that (a) Contract Exhibit C was not part of the Utility/ Noranda Contract, (b) Terms and Conditions ¶ 19 was a part of the Utility/ Noranda Contract, (c) Terms and Conditions ¶19 was "not enforceable as a matter of law as an indemnity agreement between Utility and Noranda, and did not create any duty on the part of Utility to defend and indemnify Noranda for Noranda's own negligence," (d) TIG did not waive its right to assert non-liability for Noranda's defense and indemnification; (e) TIG was not estopped to assert non-liability and claim reimbursement for sums paid in settlement of the

Underlying Action, and (f) TIG was not obligated under the Utility/TIG Policies to defend and indemnify Noranda against Murphy's claims in the Underlying Action. (LF 149-52)

38. On November 6, 2002, Noranda and Zurich filed their Motion for New Trial, Alternative Motion to Amend the Judgment in the Instant Action ("Motion for New Trial"). On February 3, 2003, the trial court entered its Order and Judgment denying the Motion for New Trial. On February 11, 2003, Noranda and Zurich filed their Notice of Appeal. On November 23, 2004, this Court directed that the appeal be transferred to the Court pursuant to Mo. R. Civ. P. 83.04.

POINTS RELIED ON

ARGUMENT

I. THE TRIAL COURT ERRED IN EXERCISING SUBJECT MATTER JURISDICTION TO ADJUDICATE PLAINTIFFS' FIRST AMENDED PETITION FOR DECLARATORY JUDGMENT AND INDEMNITY ("PETITION") AGAINST DEFENDANT ZURICH BECAUSE NO SUBJECT MATTER JURISDICTION EXISTED FOR SUCH ADJUDICATION, IN THAT PLAINTIFFS' ONLY CLAIM AGAINST ZURICH IN THE PETITION IMPLIEDLY BUT NECESSARILY SOUGHT THE TRIAL COURT'S DECLARATION OF THE RIGHTS OF DEFENDANT NORANDA AGAINST ZURICH UNDER A NORANDA-ZURICH INSURANCE POLICY, TO WHICH POLICY NEITHER PLAINTIFF WAS A PARTY OR THIRD-PARTY BENEFICIARY HAVING STANDING TO SEEK SUCH A DECLARATION.

Standard of Review: The scope of a trial court's subject matter jurisdiction is a question of law that is reviewed de novo. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 22 (Mo. banc 2003)

A. The *St. Paul* Case: A Stranger To An Insurance Contract Has No Standing To Request Its Interpretation Under The Declaratory Judgment Act.

In *St. Paul Fire & Marine Ins. Co. v. Medical Protective Co.*, 675 S.W.2d 665 (Mo. Ct. App. 1984), St. Paul Fire & Marine Insurance Company ("St. Paul") had issued a personal liability policy to Dr. Hite, and Medical Protective Company of Fort Wayne, Indiana ("Medical Protective") had also issued a medical malpractice policy to him. *Id*. at 666. On December 5, 1978, the two separate policies were in full force and effect. On that

date, Dr. Hite allegedly defamed and libeled another doctor during a television interview. The doctor filed suit against Dr. Hite and others. *Id*.

St. Paul sought a declaration that its liability policy was excess insurance over and above coverage afforded Dr. Hite by Medical Protective's malpractice policy. *Id*. at 666-67. Medical Protective argued that its medical malpractice policy did not cover any liability relating to Dr. Hite's televised statements. *Id*. at 667. Dr. Hite was not a party to the declaratory judgment suit.

The court of appeals found that St. Paul had no standing under the Missouri Declaratory Judgment Act to request the trial court to interpret the contract of insurance purchased by Dr. Hite from Medical Protective. *Id*. In reaching this conclusion, the court of appeals noted that St. Paul was not a party to the Medical Protective policy, nor was it a third-party beneficiary who could enforce it. "No authority has been cited to this court and we find none which would authorize or grant standing to seek a declaration of rights under a contract to one who is not a party and who has no right to enforce the contract." *Id*.

As part of its analysis in *St. Paul*, the court of appeals also discussed the applicability of its holding in *Hardware Center, Inc. v. Parkedge Corp*., 618 S.W.2d 689 (Mo. Ct. App. 1981). In *Hardware Center*, the Court of Appeals held that the provisions of the Missouri Declaratory Judgment Act do not extend standing to a party or enlarge the jurisdiction of courts over subject matter or parties. *Id*. at 694-95. The Act "merely opens the door of the court to certain potential defendants or plaintiffs at a stage prior to that justifying an action for other traditional relief." *Id*. at 694. Therefore, the Act did not grant standing to a stranger to the contract to be construed. *Id.*

The court of appeals concluded in the *St. Paul* case that only parties with a present interest in a written contract may ask a court to determine questions of contract construction or validity under the Declaratory Judgment Act. *St. Paul*, 675 S.W.2d at 667; R.S.Mo. § 527.020 (2000). St. Paul, the Court determined, had failed to present a set of facts from which the Court could find that St. Paul had a present legal controversy with Medical Protective. Consequently, St. Paul did not have standing to pursue a declaratory judgment seeking a determination of rights and obligations in a policy in which it had no present interest, and the trial court, therefore, had no subject matter jurisdiction over the action. *Id*. at 667.

The court in *American Economy Insurance Co. v. Ledbetter*, 903 S.W.2d 272 (Mo. Ct. App. 1995), examined and followed the *St. Paul* case. In *American Economy*, American Economy Insurance Co. ("Economy"), the automobile insurer for one of the drivers involved in a fatal automobile accident, brought a declaratory judgment action to determine whether it or the other driver's automobile insurer, Colonial Insurance Co. of California ("Colonial"), had to provide coverage for the claims of the other driver's family. Economy named as defendants Colonial and the three surviving members of the family of the other driver, Ledbetter. *Id*. at 274.

After a lengthy discussion of the facts of *St. Paul*, the *American Economy* court concluded that *St. Paul* controlled the case before it. The court found that, like St. Paul, Economy was not a party to or a third-party beneficiary of the insurance contract it had asked the court to construe. *Id.* at 275-76. Therefore, Economy failed to demonstrate standing. *Id*. at 276.

B. The Plaintiffs Are Strangers To The Noranda/Zurich Policies And Have No Standing To Seek A Declaration Of The Rights Of Noranda or Zurich Thereunder.

In their First Amended Petition for Declaratory Judgment and Indemnity in the above-captioned case, plaintiffs Utility Service and Maintenance, Inc. ("Utility") and TIG Insurance Company ("TIG") claimed that the trial court had jurisdiction to hear their cause for declaratory judgment pursuant to sections 527.010 - 527.030, R.S.Mo. (2000) of the Missouri Declaratory Judgment Act. (L.F. 11). In their prayer for relief, the plaintiffs asked the trial court to declare that both Noranda Aluminum, Inc. ("Noranda") and its insurer, Zurich, must reimburse TIG for the reasonable and necessary defense costs incurred by TIG in defending Noranda in the Underlying Action, and for the $4,300,000 loss payment made by TIG in the settlement of that suit. (L.F. 20).

In seeking a declaration that Noranda's insurer, Zurich, must reimburse TIG, the plaintiffs necessarily asked for a declaration that the Noranda/Zurich Policies issued by Zurich to Noranda provided coverage for the claims of Murphy against Noranda in the Underlying Action. This determination necessarily involves the interpretation of the insurance contracts between Noranda and Zurich, agreements to which the plaintiffs were not parties.

Under the reasoning of *St. Paul*, this Court should reverse for lack of subject matter jurisdiction the trial court's grant of declaratory relief in favor of the plaintiffs on their claims against Zurich. Just like the plaintiff in *St. Paul*, Utility and TIG are complete strangers to the insurance contracts between Noranda and Zurich. Plaintiffs are neither parties to nor third-party beneficiaries of those contracts and, thus, have no standing to seek a declaration

of rights thereunder. Because the plaintiffs have no standing to seek such a declaration of rights under the Noranda/Zurich Policies, the trial court had no subject matter jurisdiction to adjudicate the plaintiffs' declaratory judgment claims against Zurich.

Although neither Noranda nor Zurich challenged plaintiffs' standing to seek a declaratory judgment at trial, a challenge to standing may be raised at any time, including by the court *sua sponte*. *Aufenkamp v. Grabill*, 112 S.W.3d 455, 458 (Mo. Ct. App. 2003). Standing is a threshold requirement. Lack of standing cannot be waived and, without standing, a court has no power to grant the relief requested. *Id*.

When a question is raised about a party's standing, courts must determine the question of their jurisdiction before reaching any substantive issues, "for if a party lacks standing, the court must dismiss the case because it lacks[subject matter] jurisdiction of the substantive issues presented." *Id*. Whenever it appears by suggestion of a party or otherwise that a court lacks jurisdiction of the subject matter, the court must dismiss the action. Mo. R. Civ. P. 55.27(g)(3). This Court should therefore reverse and remand with instructions to dismiss the plaintiffs' cause of action against Zurich for lack of subject matter jurisdiction.

II. THE TRIAL COURT ERRED IN EXERCISING SUBJECT MATTER JURISDICTION TO ADJUDICATE PLAINTIFFS' PETITION AGAINST DEFENDANT ZURICH BECAUSE NO SUBJECT MATTER JURISDICTION EXISTED FOR SUCH ADJUDICATION, IN THAT PLAINTIFFS' ONLY CLAIM AGAINST ZURICH IN THE PETITION SOUGHT ENTRY OF JUDGMENT AGAINST ZURICH AS NORANDA'S LIABILITY INSURER FOR PAYMENT OF NORANDA'S LIABILITY DAMAGES TO PLAINTIFFS, WHICH DIRECT CLAIM

AGAINST ZURICH IS BARRED BY R.S.MO. § 379.200 UNLESS AND UNTIL PLAINTIFFS OBTAIN A FINAL JUDGMENT AGAINST NORANDA FOR SUCH DAMAGES.

Standard of Review: *See supra* p. 29.

A. Section 379.200 R.S.Mo. (2000) And The *Anderson* Case: A Plaintiff May Not Proceed Against An Insurance Company For Liability Damages Before Obtaining A Judgment Against The Insured.

Section 379.200, R.S.Mo. (2000), provides in pertinent part:

> Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, or damage to property if the defendant in such action was insured against said loss or damage at the time when the right of action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company, person, firm or association as described in section 379.195, and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.

In *State ex rel. Anderson v. Dinwiddie*, 224 S.W.2d 985 (Mo. banc 1949), this Court analyzed Section 6010, R.S. 1939, the nearly identically-worded predecessor to section

379.200. The court found that section 6010 applied to the action before it.[1] In that case, the plaintiff/relator sued the administrator of decedent's estate and decedent's insurer, Fidelity, for wrongful death damages. *Id*. at 986. Relator's husband, Anderson, was a passenger in a plane flown by decedent Sonksen that crashed, killing both. Fidelity had insured decedent Sonksen, as a member of the Mizzou Flying Club, Inc., against liability for bodily injuries to passengers in his plane. *Id.*

The *Anderson* court held that a claimant must obtain a final judgment against an insured defendant for a loss covered by an insured's policy before the policy proceeds can be recovered by a suit in equity as provided in section 6010. *Id*. at 987. Therefore, a

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[1] Section 6010, predecessor to current section 379.200, R.S.Mo. (2000), provided:

> Upon the recovery of a final judgment against any person, firm or corporation by any person, including administrators or executors, for loss or damage on account of bodily injury or death, . . . if the defendant in such action was insured against said loss . . . at the time when the right to action arose, the judgment creditor shall be entitled to have the insurance money, provided for in the contract of insurance between the insurance company . . . and the defendant, applied to the satisfaction of the judgment, and if the judgment is not satisfied within thirty days after the date when it is rendered, the judgment creditor may proceed in equity against the defendant and the insurance company to reach and apply the insurance money to the satisfaction of the judgment.

With the exception of the addition of a sentence about proceeding against an insurance company in liquidation, current section 379.200 mirrors former section 6010.

claimant may not proceed directly against an insurer to recover liability insurance proceeds. *Id.* at 988. The court found relator should have sued the decedent insured's personal representative for damages. Then, if successful, and if the judgment was not satisfied within thirty days, relator could have proceeded against insured and Fidelity in an equity action to recover the Fidelity insurance proceeds to satisfy the judgment. *Id*. at 989.

The court also relied on the Fidelity insurance policy at issue, in addition to section 6010, in holding relator could not proceed against Fidelity before obtaining a judgment against the insured's legal representative. The insurance policy provided that no action would lie against Fidelity unless and until the amount of the insured's obligation to pay had been finally determined either by judgment against the insured or by written agreement signed by the insured, the claimant, and Fidelity. *Id*. at 988. Any person who secured such judgment or written agreement would be entitled to recover under the policy to the extent of such judgment or written agreement, provided such recovery did not exceed the limits of the policy. The policy further read, "Nothing in this policy shall give any person or organization any right to join the Insurer as a co-defendant in any action against the Insured to determine the Insured's liability." *Id.*

This Court found that, given the provisions of section 6010 and the policy issued to the insured by Fidelity, relator had no right to join Fidelity as a codefendant and recover a judgment directly against it. *Id*. at 988. The Court held that a plaintiff may not proceed against an insurance company for liability damages before obtaining a judgment against the insured. *Id.* at 989.

Similarly, in *Desmond v. American Insurance Co*., 786 S.W.2d 144 (Mo. Ct. App. 1989), a woman allegedly injured in a movie theatre made a demand on the theatre owner's insurer for payment of her medical bills in the amount of $3,170.14. The insurance policy issued to owner by insurer, American, provided for the payment by American of reasonable medical expense benefits to individuals injured on the premises of the theatre. *Id*. at 145. American paid the claimant $2,394.14 for medical expenses. Claimant filed a direct action against American to obtain the additional $786 in expenses. *Id.*

The court stated, "The general rule is that an injured party cannot proceed in a direct action against an insurance company providing liability coverage for an insured who allegedly caused the harm sustained by the claimant." *Id*. It noted that a claimant normally must bring an action against the alleged tortfeasor to establish liability for payment. *Id.* Ultimately, given the specific nature of the medical expense payment provisions at issue, the court held that the claimant fell under an exception to the general rule as a direct third-party beneficiary of the medical expense payment coverage. *Id*. at 147.

B. Plaintiffs Could Not Proceed Against Zurich To Secure The Proceeds Of The Noranda/Zurich Policies Unless And Until They Had First Obtained A Judgment Against Noranda.

Plaintiffs proceeded directly against Zurich in the instant action to obtain payment from Zurich, under the liability policies Zurich had issued to Noranda, for the claims the plaintiffs were asserting against Noranda in the very same case. Under § 379.200 and the authority of *Anderson/Desmond*, however, the plaintiffs had no direct cause of action against Zurich.

The Noranda/Zurich Policies also barred a direct action against Zurich, as a relevant provision therein mirrored the pertinent provision of the policy in *Anderson* that this Court, in part, found determinative in nullifying a direct action claim against an insurer. The Comprehensive General Liability Insurance Policy No. 8905624 issued by Zurich to Noranda contains the following provisions:

> No action shall lie against the Insurer unless, as a condition precedent thereto, . . . the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Insurer. . . . Nothing contained in this Policy shall give any person or organization any right to join the Insurer as a co-defendant in any action against the Insured to determine the Insured's liability."

(P. Ex. 38, p. 11; T., 140:24-25)

The plaintiffs should have proceeded against only Noranda in the instant action, and then, only if and when they were successful in obtaining a judgment against Noranda, pursued Noranda and Zurich in equity, if necessary, to satisfy the judgment. Because the plaintiffs had no right to join Zurich as a defendant, the trial court's judgment in favor of the plaintiffs against Zurich should be reversed for lack of subject matter jurisdiction.

III. THE TRIAL COURT ERRED IN ENTERING JUDGMENT AGAINST NORANDA AND ZURICH REQUIRING THEM TO INDEMNIFY TIG FOR ITS SETTLEMENT PAYMENT TO MURPHY AND FOR ITS ATTORNEYS' FEES AND EXPENSES INCURRED IN DEFENDING NORANDA, BECAUSE TIG HAD NO

RIGHT TO SEEK SUCH INDEMNIFICATION OR REIMBURSEMENT FROM NORANDA AND ZURICH FOR SUCH PAYMENTS, IN THAT TIG POSSESSED FULL KNOWLEDGE OF ALL MATERIAL FACTS BEARING UPON ITS OBLIGATION VEL NON TO MAKE SUCH PAYMENTS, REMAINED UNCERTAIN WHETHER IT WAS OBLIGATED TO PAY NOTWITHSTANDING SUCH KNOWLEDGE, AND NEVERTHELESS PAID THE MONIES.

Standard of Review: When the material or pertinent facts are not in dispute, the reviewing Court independently reviews the facts and the matter becomes a question of law for the Court. *See McKay v. Nelico Meat Prods. Co*., 174 S.W.2d 149, 157 (Mo. 1943).

A. The Traditional Rule: Payment By An Insurer, With Full Knowledge Of Facts Supporting A Defense To Payment, Constitutes A Waiver Of Its Right To Rely Thereon Or To Recover The Payment Made; Payment By An Insurer Knowing There Is Uncertainty As To Whether Payment Is Due, Constitutes The Insurer's Assumption Of The Risk That Payment Is Not Due, And The Insurer Cannot Obtain Restitution Of Monies Paid If It Had No Obligation To Pay.

"[A] volunteer who pays money, in the absence of fraud or duress, is not entitled to the return of his money. But the law requires in order to be in this status, one must have full knowledge of all the facts in the case." *Commercial Union Ins. Co. v. Farmers Mut. Fire Ins. Co.*, 457 S.W.2d 224, 226 (Mo. Ct. App. 1970).

> The rule of law is well settled that where money has been voluntarily paid with full knowledge of the facts it cannot be recovered on the ground that the payment was made under a misapprehension of the legal rights and obligations

> of the person paying – which is to say, under a mistake of law." [Citation omitted.] It is universally recognized that money voluntarily paid under a claim of right to the payment, and with knowledge of the facts by the person making the payment, cannot be recovered back on the ground that the claim was illegal, ***or that there was no liability to pay in the first instance***. ***This is true even though the payor makes the payment and expressly reserves his right to litigate his claim, or under protest, or under the impression that the demand was legal***. Missouri courts have uniformly followed the rule [footnote omitted] since 1868 when the Supreme Court first applied it . . . stating: 'The rule of law is well established, both in England and in this country, that a person who voluntarily pays money with full knowledge of all the facts in the case, and in the absence of fraud or duress, cannot recover it back, though the payment is made without a sufficient consideration, or under protest. ***With specific reference to the law of insurance, it is considered by standard authority that payment by the insurer, with knowledge of facts to support a policy defense, amounts to a waiver of its right to rely thereupon or to recover the payment made***.

American Motorists Ins. Co. v. Shrock, 447 S.W.2d 809, 811-12 (Mo. Ct. App. 1969) (emphasis added).

"The Restatement of Restitution, § 7 defines a 'mistake of fact' as 'any mistake except a mistake of law.' A 'mistake of law' is defined as 'a mistake as to the legal

consequences of an assumed state of facts.'" *State Farm Mut. Auto. Ins. Co. v. Sabourin*, 574 S.W.2d 8, 10 (Mo. Ct. App. 1978).

> "[An insurer's] misconception of its policy obligation may not be considered to have been a mistake of fact, but instead, must be regarded as a mistake of law. 'A mistake of law occurs where a person ***is truly acquainted with the existence or nonexistence of facts***, but is ignorant of, or comes to an erroneous conclusion as to, their legal effect.' [Citation omitted.]"

American Motorists Ins. Co. v. Shrock, 447 S.W.2d 809, 811 (Mo. Ct. App. 1969) (emphasis added).

In *American Motorists*, an automobile liability insurer sought to recover from its insured certain monies that the insurer had paid as burial expenses for the insured's deceased husband, who was killed while driving an insured vehicle. The insurer claimed restitution based upon a policy provision that excluded coverage for benefits payable under the workers' compensation law. The court denied restitution, holding that the insurer paid the policy benefits under a mistaken belief that the surviving insured could not obtain workers' compensation benefits. "That conclusion was necessarily reached either ***with full knowledge of all the facts*** pertaining to its liability under the insuring clause, and any relief therefrom afforded by the exemption clause – ***or at least with unlimited opportunity to so inform itself***." *Id*. at 811 (emphasis added) (the "Full Knowledge/Unlimited Opportunity Bar" to an insurer's claim for restitution).

> 'The mistake of [the insurer] was obviously a mistake of law. It concluded, with full knowledge of the facts, that there was liability under its policy and

> made payments accordingly. Money deliberately and voluntarily paid under a contract, with knowledge or means of knowledge of the material facts and without fraud or duress, even though paid under a mistake of law as to the interpretation of a contract, cannot be recovered. [Citation omitted]. . . . A person who, induced thereto solely by a mistake of law, has conferred a benefit upon another to satisfy in whole or part an honest claim of the other to the performance given, is not entitled to restitution.' [Citation omitted]

Id. at 813.

Most importantly, an insurer may have knowledge of the existence or non-existence of all material facts bearing upon its payment obligation, but still remain uncertain about whether such payment obligation exists. Missouri courts, however, have denied the insurer implied indemnity or restitution if it disbursed funds knowing there was uncertainty as to whether payment was due. In such a circumstance, the insurer is deemed to have assumed the risk that it was not obligated to make such a payment, and is not entitled to restitution or reimbursement of the monies disbursed if the obligation is ultimately found not to have existed. F*armers New World Life Ins. Co. v. Jolley*, 747 S.W.2d 704, 707 (Mo. Ct. App. 1988); *see also Ticor Title Ins. Co. v. Mundelius*, 887 S.W.2d 726, 728 (Mo. Ct. App. 1994).

B. TIG Paid The $4.3 Million Settlement Payment To Murphy In The Absence Of Fraud Or Duress With Full Knowledge Of The Existence Or Non-Existence Of All Material Facts Bearing Upon Its Obligation Vel Non To Make Such Payments, With An Unlimited Opportunity To Fully Inform Itself Of All Such Material Facts Or

Their Legal Import, And/Or, While Uncertain Whether Or Not It Was Obligated To Make Such Payment.

Murphy filed the Underlying Action on or about June 15, 1995. *See* Factual Statement, ¶ 10. On June 30, 1995, Noranda forwarded Murphy's Petition in the Underlying Action to Utility for defense and indemnification under the Utility/Noranda Contract. *See* Factual Statement, ¶ 11. On ***July 6, 1995***, approximately ***3 ½ years before*** it paid Murphy the $4.3 Million Settlement Payment, TIG received its ***first notice*** of Noranda's demand from Utility for defense and indemnification under the Utility/Noranda Contract when it received from Utility's broker/agent a copy of the Petition forwarded by Noranda to Utility, along with Noranda's demand for defense and indemnification (TIG's "First Notice of Noranda's Demand"). *See* Factual Statement, ¶ 12.

On September 6, 1995, approximately 2 months after TIG's First Notice of Noranda's Demand, during which time TIG investigated whether Utility owed Noranda defense and indemnification in relation to Murphy's claims in the Underlying Action, TIG's Retained Noranda Counsel advised TIG: "[I]t appears that ***[P]aragraph 19 [not Contract Exhibit C]*** may require Utility to honor the tender of defense and indemnity made by Noranda." *See* Factual Statement, ¶15. Thus, ***almost 3 ¼ years before*** TIG paid the $4.3 million Settlement Payment to Murphy, TIG knew the precise terms and location in the Contract of Terms and Conditions ¶ 19, upon which provision a claim by Noranda for defense and indemnification in the Underlying Action could be based.

TIG investigated Noranda's claim to defense and indemnification in the Underlying Action during the period of July 6 – December 29, 2005, and identified five factors that it

determined were most relevant to its decision whether to accept Noranda's tender (which included its Retained Noranda Counsel's September 6, 1995 recommendation as to Paragraph 19). *See* Factual Statement, ¶ 17. Based upon that investigation and the five factors identified by TIG, ***on December 29, 1995, approximately 3 years before*** it paid Murphy the $4.3 Million Settlement Payment, TIG authorized its Retained Noranda Counsel to ***unconditionally accept*** the tender of defense and indemnification by Noranda and to ***unconditionally enter*** their appearance as counsel for Noranda in the Underlying Action. See Factual Statement, ¶ 16.

On or about ***March 4, 1997, almost 1 ¼ years after*** TIG's ***unconditional*** acceptance of Noranda's tender of defense and indemnification in the Underlying Action, ***and almost 2 years before*** it paid Murphy the $4.3 million Settlement Payment, TIG hired new Coverage Counsel to determine whether Utility and TIG owed Noranda the duty of defense and indemnification that TIG had already ***unconditionally accepted and assumed*** in the Underlying Action. *See* Factual Statement, ¶ 21.

By ***May 14, 1997, almost 2 years after*** TIG's First Notice of Noranda's Demand, and ***over 1 ½ years before*** it paid Murphy the $4.3 million Settlement Payment, TIG ***knew*** that Utility, its insured, was claiming that Contract Exhibit C, one of the sources of the claimed indemnity along with Terms and Conditions ¶ 19, was not a part of the Utility/Noranda Contract. *See* Factual Statement, ¶ 22. By ***May 16, 1997, over 1 ½ years before*** it paid Murphy the Settlement Payment, TIG obtained from Noranda a copy of Contract Exhibit C, which Noranda had claimed was part of the Utility/Noranda Contract. *See* Factual Statement, ¶ 23.

Thus, it cannot be disputed that, by ***May 16, 1997, over 1 ½ years before*** it paid Murphy the Settlement Payment, TIG knew of the existence or non-existence of ***all the material facts*** bearing upon its determination as to whether it was obligated to defend and indemnify Noranda in the Underlying Action. TIG possessed both of the Contract's purported indemnity provisions, Terms and Conditions ¶ 19 and Contract Exhibit C. TIG knew precisely where Paragraph 19 was located in the Contract, the manner in which it was manifested therein, and its specific terms. TIG also knew (a) the precise language of purported Contract Exhibit C and its supposed location in the Contract documents, (b) the claim of its insured, Utility, that Contract Exhibit C had never been made a part of the Utility/Noranda Contract because Utility had never seen or been provided the exhibit or otherwise assented to its terms, (c) the claim of Noranda that Exhibit C was a part of the Contract, and (d) the uncertainty it still possessed regarding whether it had an obligation to defend and indemnify Noranda in the Underlying Action because of the contradictory assertions by its insured and Noranda regarding Exhibit C. (collectively, the "Material Facts") *See* Factual Statement, ¶ 22.

Notwithstanding this knowledge and uncertainty, TIG did absolutely nothing for the ensuing 1 ½ years to act on that knowledge or to remove that uncertainty. TIG continued to defend and indemnify Noranda in the Underlying Action over the course of this 1 ½ year period just as it had during the previous 1 ½ years after unconditionally accepting tender of Noranda's defense and indemnification on December 29, 1995. TIG possessed ***full and unlimited opportunity***, both before and after May 16, 1997, to have sought a timely judicial determination of its defense and indemnity obligation based upon the Material Facts it knew

to exist or not exist, and thereby remove any uncertainty that it possessed as to its payment obligation. Nevertheless, in November 1988, ***over 1 ½ years after acquiring full knowledge of all Material Facts*** and ***without having utilized*** its unlimited opportunity to obtain timely declaratory relief to remove any uncertainty as to its obligation to pay, TIG paid the Settlement Payment to Murphy to settle the Underlying Action (following a mediation in which TIG entirely controlled the settlement negotiations with Murphy).

C. No Fraud Or Duress Is Manifested In This Case To Nullify Application Of The Traditional Rule Providing That An Insurer Cannot Obtain Restitution Of A Voluntary Payment Made With Knowledge Of All Material Facts

No circumstances of fraud or duress are present in this case to nullify the application of the traditional rule denying restitution or reimbursement to a voluntary payor. TIG paid money with full knowledge of all of the Material Facts relevant to its obligation vel non to pay, but while it was still uncertain as to the existence of such obligation. Certainly, there is no hint or suggestion whatsoever of any fraudulent or improper inducement by Noranda on which TIG could have relied to its detriment in deciding to pay the Settlement Payment to Murphy.

There was also no duress in this case, economic or otherwise, that nullifies the application of the traditional rule barring TIG's claimed restitution.

> It is sufficient to constitute duress . . . that one party thereto is prevented from exercising his free will by reason of threats made by other, and that the contract [or payment] is obtained by reason of such fact. The test is the state of mind induced by the threats made. The character of the threats is not so

material, it being sufficient to constitute legal duress, if they deprive the party purporting to be obligated of his free moral agency.

Coleman v. Crescent Insulated Wire & Cable Co., 168 S.W.2d 1060, 1066 (Mo. 1943); *see also Gott v. First Midwest Bank*, 963 S.W.2d 432, 440 (Mo. Ct. App. 1998); *Coalition To Preserve Education On The West Side v. School District*, 649 S.W.2d 533, 547 (Mo. Ct. App. 1983); *Wilson v. Wilson*, 642 S.W.2d 132, 135 (Mo. Ct. App. 1982).

Alternatively, economic duress arises only when (1) the coerced party has been the victim of a wrongful or unlawful act, (2) the act or threat was one which deprived the victim of his or her unfettered will, (3) as a direct result, the coerced party was compelled to make a disproportionate exchange of values or give up something for nothing, (4) the payment or exchange was made solely for the purpose of protecting the coerced party's business or property interests, and (5) the coerced party had no adequate legal remedy. *See State ex rel. State Highway Comm'n*, 575 S.W.2d 712, 733-35 & nn.14-18 (Mo. Ct. App. 1978) (J. McMillian dissenting) (citing *Williston on Contracts*); *see also* 28 *Williston on Contracts*, § 71:19 (4th Ed.).

Certainly, in this case, it cannot be remotely argued that TIG was prevented from exercising its free will by wrongful threats or acts, or otherwise deprived of its free moral agency, in deciding to pay the Settlement Payment to Murphy. After indisputably possessing all Material Facts in existence relevant to its payment decision, TIG had over 1 ½ years to remove the remaining uncertainty by initiating its adequate legal remedy of a declaratory judgment action to obtain a pre-Settlement Payment determination that neither it nor its

insured owed any defense and indemnification obligation to Noranda in the Underlying Action. TIG failed to undertake this fully adequate legal remedy.

If TIG felt compulsion to pay the Settlement Payment in November, 1998, such compulsion as TIG may have felt was a product solely of its own inexplicable failure to undertake its legal remedies on a timely basis before that time to remove any uncertainty it may have had about its legal obligation to defend and indemnify. By sitting on the coverage/liability issue until the eve of a $30,000,000 personal injury trial against its insured's putative indemnitee, TIG felt compelled to pay the Settlement Payment simply to avoid its independent liability to its insured, Utility, for breaching its duty of prompt investigation of potential coverage liability defenses. *See* Factual Statement, ¶ 27.

D. No Independent Equitable Considerations Exist In This Case That Would Warrant A Departure From The Traditional Rule Providing That An Insurer Cannot Obtain Restitution Of A Voluntary Payment Made By It Under The Facts Of This Case; In Fact, The Case Equities Dictate Against Providing TIG Such Restitution.

> The Missouri courts have indicated that the rule [i.e. no restitution to the insurer for a mistake of law] is harsh and should be abandoned when independent equitable considerations warrant. . . . [The case of *Handly v. Lyons,* 475 S.W.2d 451, 462 (Mo. Ct. App. 1971)] criticized the rule denying relief from mistakes of law, stating that '(w)hatever may be the status of the general rule, it is universally acknowledged that equity always relieves against a mistake of law when the ***surrounding facts raise an independent equity, as***

where the mistake is induced, or is accompanied by inequitable conduct of the other party.' 475 S.W.2d at 462-63.

Glover v. Metropolitan Life Ins. Co., 664 F.2d 1101, 1104 (8th Cir. 1981); *see also Fidelity & Deposit Co. v. FDIC*, 54 F.3d 507, 513 (8th Cir. 1995); *Western Casualty & Sur. v. Kohm*, 638 S.W.2d 798, 800 (Mo. Ct. App. 1982).

There are no independent equities arising in this case that would militate in favor of abandoning application of the traditional rule barring restitution to TIG who, without the influence of any fraud or duress, paid money with full knowledge of all Material Facts bearing upon its payment obligation, but with continuing uncertainty as to the existence of such obligation. In fact, the only independent equities that arise in this case arise ***against TIG*** and its claim for restitution or reimbursement of its Settlement Payment.

Most demonstrative of the inequities created by TIG is the October 8, 1998 letter that Utility wrote to TIG less than 60 days before commencement of Murphy's $30 million personal injury trial against Utility's putative indemnitee, Noranda. See Factual Statement, ¶ 28. As manifested in the letter, Utility was demanding that TIG settle the Underlying Action with Murphy ***irrespective of any resolution of the indemnification language issue with Noranda***. This is because, by that late date, TIG's complete inaction on the indemnification issue, and its inexplicable failure to utilize its declaratory judgment remedy to obtain a timely judicial determination removing the uncertainty surrounding the legal effect of the Material Facts known to it, had created wholly new threats to its insured (TIG's "Inaction and Failure").

As stated by Utility in the letter, by virtue of TIG's Inaction and Failure, on the eve of trial, (a) no potential settlement with Murphy, a catastrophically injured plaintiff, had been explored, (b) Murphy was demanding damages against Noranda, Utility's potential indemnitee, of $30 million, an amount far in excess of any liability insurance coverage or funds that Utility had, (c) TIG had consistently defended Noranda in the Underlying Action throughout the preceding 3 ½ years in express deference to the Contract indemnity provision at ***Terms and Conditions ¶ 19***, but was now suggesting to Utility on the eve of trial that perhaps TIG and Utility did not have that obligation because **Contract Exhibit C** was arguably not part of the Contract, and (d) TIG was telling Utility now that ***it, Utility***, should hire its own separate attorney to represent it with respect to whether TIG was required to defend and indemnify Noranda in the Underlying Action.

Because of its Inaction and Failure, TIG had placed itself in a position in relation to its insured whereby its own breach of its duty to Utility to investigate a potential coverage/liability defense had, in and of itself, placed its insured, Utility, in a very precarious position on the eve of trial, a position from which only TIG's prompt settlement with Murphy could extricate it. At that point in time, TIG's payment of the Settlement Payment was as much a payment to avoid its own liability to its insured because of its breach of duty to investigate timely and its actionable Inaction and Failure as it was a payment to discharge its insured's indemnification responsibility to Noranda. The fact that TIG's Settlement Payment to Murphy happened to accomplish both ends does not give rise to any "equity" entitling TIG to restitution of the Settlement Payment.

There are certainly marked inequities in this case, but they do not arise in favor of TIG's search for restitution, but against it. Therefore, there are no independent equities that dictate abandonment of the traditional rule denying restitution to voluntary payors like TIG who pay money with knowledge of all material facts bearing upon their responsibility to do so.

CONCLUSION

WHEREFORE because TIG was a voluntary payor as set forth above, this Court should reverse the decision of the trial court in this case awarding judgment in favor of TIG and Utility and against Noranda and Zurich, and enter judgment in favor of Noranda and Zurich on Plaintiffs/Respondents' claims for declaratory judgment and indemnity. In the alternative, this Court should dismiss the claims against Zurich for lack of subject matter jurisdiction.

Dated this 14th day of January, 2005.

Respectfully submitted,

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RULE 84.06(c) CERTIFICATION

The undersigned certifies that the foregoing substitute brief complies with Mo.R.Civ.P. 84.06(b) and contains 12,658 words.

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CERTIFICATE OF SERVICE

This certifies the undersigned attorney has caused service of one (1) Rule 84.06(a) copy and one (1) Rule 84.06(g) disk of **SUBSTITUTE BRIEF OF APPELLANT ZURICH INSURANCE COMPANY** and one (1) copy of **APPENDIX OF SUBSTITUTE BRIEF OF APPELLANT ZURICH INSURANCE COMPANY** to be made by first-class mail, postage prepaid, to the address of the following attorneys representing parties to this action, on this 14th day of January, 2005:

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